Supreme Court, U.S.
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No. 09-709

IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PETITIONER JEFFREY J. REED

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae are religious organizations that are deeply concerned about the impact of this case upon the ability of their members and other persons of faith to follow their religious beliefs when they conflict with general work requirements. The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 59,000 congregations with more than 15 million members worldwide. In the United States the North American Division of the General Conference overseas the work of more than 5,000 congregations with more than one million members. The Seventh-day Adventist church has throughout its history defended religious liberty interests for its members and other individuals of faith.

The Ethics & Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 44,000 churches and 16.3 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as the sanctity of human life, ethics, and religious liberty. *Amici* are especially concerned that this Court should clarify the law and

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of the brief. There are no persons other than *amici curiae*, their members and counsel who have made any such monetary contribution. Pursuant to Supreme Court Rule 37.4, *amici curiae* state that all counsel of record received timely notice of the intent to file this brief and consent has been granted by all parties.

resolve the current circuit split which results in significant disparity in the Title VII accommodation protection afforded to *amici*'s members and other persons of faith. Under existing case law, the scope of Title VII's accommodation protection is dependent solely upon the circuit in which the case is brought.

Some circuits provide no protection unless the employee is discharged. Some circuits (including the Sixth Circuit in the instant decision) afford protection only if the employee is discharged or disciplined. Other circuits interpret Title VII in a broader and more pragmatic fashion. Should the requirement of "discharge or discipline" applied below be permitted to stand as a pre-condition for administrative or judicial review of unresolved conflicts between work and religion, employees who are forced to make the hard choice between their beliefs and their jobs will find they have no legal recourse unless they resort to self-help and place their livelihoods at risk by refusing to follow the conflicting work requirement. Such a pre-condition would also render broad categories of work-religion conflicts (including those such as the instant case) immune to judicial review, even in cases of acknowledged discrimination.

For all these reasons, *amici* are strongly interested in and concerned about the outcome of this case. *Amici* address only Question One related to whether an employee must be discharged or disciplined to satisfy the adverse action element of a religious discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

SUMMARY OF ARGUMENT

Since its inception, Title VII has always included among its most important objectives the protection of religious rights in the workplace. The earliest versions of the statute identified the protected classes of "race, color, and religion." Francis J. Vaas, Title VII: Legislative History, 7 BOSTON COLLEGE INDUS. & COMMERCIAL LAW REVIEW 431 (1966). Recent trends have increased the importance of protecting religious rights in the workplace.

A survey has found that 66% of employees surveyed reported that they had witnessed religious discrimination in the workplace. Tanenbaum Center for Interreligious Understanding, *Religious Bias in the Workplace: The Employee's View* (1999) (executive summary *available at* http://www.tanenbaum.org/research_1999.html) (last visited January 15, 2010). Charges of discrimination filed with Equal Employment Opportunities Commission ("EEOC") based upon religion have increased nearly 50% over the last ten years, as has the percentage of charges based upon religion when compared to the total number of charges filed. U.S. Equal Employment Opportunity Commission, *EEOC Charge Statistics FY 1999 Through FY 2008* (*available at* http://archive.eeoc.gov/stats/charges.html) (last visited January 15, 2010).

This trend will continue in the future as the number of Americans who adhere to mainstream Christianity declines, minority religions gain more adherents, and religious pluralism and diversity increase. *See* Pew Forum on Religion and Public Policy, *The Demographics of Faith*, Aug. 20, 2008 (*available at* http://www.america.gov/st/diversity-english/2008/August/20080819121858cmretrop0.5310633.html) (last visited January 15, 2010). *Amici* urge the Court

to ensure that Title VII continues to provide meaningful protection for all religious workers faced with such difficult choices by eliminating the artificial barrier erected by the split decision below and the uncertainty that exists due to the split among the circuits on this important issue.

REASONS FOR GRANTING THE WRIT

A split panel of the Sixth Circuit below exacerbated the existing uncertainty in the law by concluding that a religious employee must be discharged or disciplined before he may challenge the reasonableness of a union's purported religious accommodation. This decision deepens the confusion among the circuits and is inconsistent with the language and intent of Title VII, with this Court's precedent, and is contrary to established public policy.

Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e *et seq*, makes it an "unlawful employment practice" for a labor organization or an employer to "discriminate against any individual" because of that individual's religion. 42 U.S.C. § 2000e-2(a)(1) (employer); § 2000e-2(c)(1) (labor organization). Title VII recognizes the limited role of a labor organization vis-à-vis the employer and employee by making it an unlawful employment practice for a labor organization to "cause or attempt to cause an employer to discriminate against an individual[.]" 42 U.S.C. § 2000e-2(c)(3).

Under Title VII, claims based upon religion, like claims based upon disability under the Americans With Disabilities Act of 1990, 42 U.S.C. § *12131 et seq*, are of two types: (1) disparate treatment and (2) failure to accommodate. *See Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-55 (10th Cir.

2000). Title VII makes clear that religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This definition "somewhat awkwardly" incorporates the reasonable accommodation duty. *Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986). Thus, Title VII does not merely prohibit disparate treatment, but also imposes an affirmative duty to accommodate religious practice, where such accommodation may be accomplished without undue hardship on the employer. *See, e.g., EEOC v. United Parcel Service*, Inc., 94 F.3d 314, 318 n.3 (7th Cir. 1996).

Religious persons commonly adhere to religiously prescribed practices that simultaneously honor their God(s) and distinguish themselves from persons who do not share their religious beliefs. These religious practices frequently conflict with work requirements.

One of the most frequent conflicts between religion and work rules involves employees' observance of a weekly Sabbath and other holy days and employers' work scheduling. *See, e.g., Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60 (1986); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008); *Jones v. United Parcel Service, Inc.*, 307 Fed. Appx. 864 (5th Cir. 2009) (*per curiam*); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997); *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024 (8th Cir. 2008); *Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999); *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317 (11th Cir. 2007).

For example, Seventh-day Adventists, observant Jews, Seventh Day Baptists, members of the Church of God, and numerous other religious groups all observe a weekly Sabbath on Saturday, generally from sundown on Friday to sundown on Saturday. During these times, members of these groups believe they must abstain from most secular labor and employment. Other Christian denominations hold the same view regarding Sunday observance, and some Muslim groups participate in similar observances for periods of prayer on Fridays. In addition, Jewish, Muslim and Christian groups observe holy days that often occur during the business week.

Another issue of conflict that frequently arises in the workplace involves religious apparel and appearance. For example, many Muslim women believe the Koran requires them to cover their heads with scarves in public. *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009). Other Muslim women cover their entire body, leaving only their face and hands exposed. *United States v. Board of Ed. for the Sch. Dist. of Philadelphia*, 911 F.2d 882 (3rd Cir. 1990). Some Muslim males wear a religiously mandated head covering, or kufi. *Rattler v. Sublett*, 1998 U.S. App. LEXIS 10213 (9th Cir. 1998); *St. Claire v. Cuyler*, 634 F.2d 109 (3rd Cir. 1980). Sikhs are required by their religious commitments to wear turbans and beards. *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984). Conservative and Orthodox Jews believe they must wear head coverings, such as hats or yarmulkes. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Rastafarians are required to wear their hair in long dreadlocks. *Booth v. Maryland*, 327 F.3d 377 (4th Cir. 2003). Some Rastafarians wear loose fitting "crowns" over their dreadlocks. *Benjamin v. Coughlin*, 905 F.2d 571 (2nd Cir.), cert. denied, 498

U.S. 951 (1990). Other religious persons do not cut or shave their body hair. *Potter v. District of Columbia*, 558 F.3d 542 (D.C. Cir. 2009) (unidentified religiously motivated refusal to shave beard); *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988) (Greek Orthodox limits upon shaving beard and cutting hair); *Friedman v. Arizona*, 912 F.2d 328 (9th Cir.), *cert. denied*, 498 U.S. 1100 (1990) (Orthodox Jewish limits upon shaving beard); *Gallahan v. Hollyfield*, 670 F.2d 1345 (4th Cir. 1982) (*per curiam*) (Native American limits upon cutting hair).

A third area of frequent work-religion conflict involves religious expression. Forty eight percent of Americans recently surveyed had discussed religion in the workplace in the past twenty-four hours. *See* George Gallup, Jr. & Timothy Jones, *The Next American Spirituality: Finding God in the Twenty-First Century*, at 72 (2000) (cited in U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual, Section 12, at n. 111 (*available at* http://www.eeoc.gov/policy/docs/religion.html#_ftn111) (last viewed January 15, 2010). As is true with observance of holy days and religious apparel and appearance, religious expression takes many forms. Some religious employees display religious books, icons or messages on their persons or at their work stations. Others engage in one-on-one discussions regarding religious beliefs, distribute literature, or use religious greetings. Other religious employees engage in prayer at their work stations or in other areas of the workplace, and some employers sponsor prayer meetings or other religious expression. *See, e.g., Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2nd Cir. 2001) (employee evangelism of clients); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140 (5th

Cir. 1975) (staff meetings beginning with religious exercises); *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001) (employee's use of phrase "Have a Blessed Day"); *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (supervisor's prayers during meetings); *Berry v. Dep't of Social Servs.*, 447 F.3d 642 (9th Cir. 2006) (employee's display of religious items in cubicle and discussion of religion with clients); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (employee's wearing necklace with cross); *Banks v. Serv. Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996) (employee's greeting customers with "God Bless You" and "Praise the Lord"); *Rivera v. Choice Courier Sys., Inc.*, 2004 WL 1444852 (S.D.N.Y. June 25, 2004) (employee's wearing of "Jesus is Lord" patch).

These practices do not reflect mere personal preference or desire. Believers understand them as divine requirements which they are obligated to obey to maintain good standing within their faith. Most such religious groups do not grant "exemptions" or "dispensations" from these requirements because the requirements are viewed as part of God's law. However, *amici* are mindful that the faith of some religious persons is weaker than that of others. Some religious persons will succumb to the temptation to commit a sin by violating their conscience, or "fall away" from the faith altogether when faced with a conflict between work and religion.

The faith of these most susceptible persons should not therefore be subject to less protection merely because they succumb to the very temptation proscribed by Title VII, but this is the inevitable result of the "discharge or discipline" requirement. Moreover, the uncertainty in the law governing the

accommodation obligation creates an additional difficulty in reaching effective accommodations because the participants in that process do not have clear guidance as to what is expected of them. Unless this Court resolves this circuit split and provides such guidance, these most vulnerable members receive no effective protection under Title VII in several circuits.

The current conflicted state of the law is troubling to *amici* for another reason. Some religious groups have developed theological methods to address apparently conflicting religious duties. For example, the Church of Jesus Christ of Latter-day Saints has adopted the view that where the religious obligation to keep the Sabbath necessarily and unavoidably conflicts with the obligation to support one's family (as is the case where an employee's job is placed in jeopardy due to Sabbath observance), the obligation to support one's family takes precedence. Likewise, Seventh-day Adventists acknowledge that certain types of labor in service to others (*e.g.*, healthcare professions) may occur without violating the Sabbath, as long as that labor is necessary and unavoidable.

In such cases, religious employees faced with an employer's intransigent mandate to work on a holy day may do so without violating their religious beliefs, as long as the requirement is necessary and unavoidable. However, the restrictive test employed by some circuits prevents any review of such mandates unless the employee refuses to work and is discharged or disciplined—even in cases where the employer admits that its work mandate was neither necessary nor unavoidable—merely because the religious employee complied "under protest" with the mandate. As a result, such cases are effectively removed from the protections of Title VII and are

administratively and judicially unreviewable, even when they are clear violations of Title VII. This Court should grant certiorari to correct this confusion among the circuits.

1. This Court should grant certiorari to preserve the language and intent of Title VII.

Amici urge this Court to grant certiorari to correct the Sixth Circuit's misinterpretation of Title VII and eliminate the uncertainty that it has created. The opinion of the Sixth Circuit requires "discharge or discipline" in order to satisfy the third (adverse action) element of a prima facie case for religious accommodation. Other circuits have even more restrictive interpretations—eliminating any protection unless the employee is discharged.

Title VII, by its plain language, applies to any and all forms of "discrimination" and failure to accommodate without any limitation other than undue hardship. The text of Title VII makes no reference to a requirement of "adverse action," let alone any requirement of "discharge or discipline" as a prerequisite to the right of religious accommodation. The clear statutory mandate to attempt accommodation is wholly inconsistent with any requirement that an employee must first suffer discharge or discipline before being eligible for accommodation. This Court should grant certiorari to eliminate this confused state of the law and clarify the respective obligations of labor organizations, employers and employees on this important issue.

2. This Court should grant certiorari to correct the Sixth Circuit's continued misinterpretation of adverse action under Title VII in a manner contrary to *White v. Burlington Northern & Santa Fe Ry.*, 548 U.S. 53 (2006).

Amici urge this Court to correct the Sixth Circuit's continued misinterpretation of adverse action under Title VII. In *White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 799 (6th Cir. 2004) (*en banc*), *aff'd*, 548 U.S. 53 (2006), the Sixth Circuit concluded that the standard for adverse action was uniform across all Title VII claims. This Court granted certiorari and rejected any such uniform standard. Interpreting identical statutory language, this Court expressly adopted a standard that was satisfied whenever the challenged conduct "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *White v. Burlington N. & Santa Fe Ry.*, 548 U.S. 53, 68 (2006) (internal citation omitted). This standard is not limited to discriminatory actions that affect the terms and conditions of employment, much less to discharge or discipline. *Id.* at 62-64.

White made clear that the adverse action element differs significantly in a retaliation claim as compared to a claim under the substantive anti-discrimination provisions of Title VII. *White* also made clear that context is critical because "a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for 'an act that would be immaterial in some situations is material in others.'" 548 U.S. at 69 (internal citation omitted). This Court provided the following explanation and illustrations:

> The significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Id. (internal citations omitted). Clearly, the schedule change and lunch invitation which this Court provided as examples of possible adverse actions in *White* are not "discharge or discipline" and would not satisfy the conflicting standard employed by some circuits.

This Court based the distinction upon the proscriptive language of the retaliation provision in Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), which like Section 703(c)(1), 42 U.S.C. § 2000e-2(c)(1), prohibits "discriminat[ion] against" an individual. In contrast, the proscriptive language in Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), prohibits discrimination only "with respect to his compensation, terms, conditions, or privileges of employment." *See White*, 548 U.S. at 62, 67. These terms in Section 703(a)(1) "explicitly limit the scope of that provision to actions that affect

employment or alter the conditions of the workplace." *Id.* at 62.

Neither of the provisions relating to religious accommodation by a labor organization contain such limiting language. Section 703(c)(1) mirrors Section 704(a), and the definition of religion in Section 701(j), 42 U.S.C. § 2000e(j), makes clear that accommodation is not limited to the terms and conditions of employment. Like Section 704(a), Title VII's accommodation requirement (Section 701(j)) and anti-discrimination provision (Section 703(c)(1)) are stated without the limiting language found in Section 703(a)(1). Moreover, while omitting the limiting language of Section 703(a)(1), Section 701(j) expressly states a different limiting principle—"undue hardship on the conduct of the employer's business." These sections of the statute should therefore be interpreted *in pari materia* with the identical language that this Court addressed in *White*.

The split Sixth Circuit repeated the same error that circuit made in *White*. As a result of this error, the religious employee's standing vis-à-vis her labor organization is now uncertain. The circuits are in disarray, as is shown by their fractured approach to this important issue. In those circuits acting consistently with this Court's decision in *White*, the right of religious accommodation extends to anything that might dissuade a reasonable worker from exercising her religion—for example, the schedule change or lunch invitation given as examples in *White*.

In contrast, none of these actions satisfy the Sixth Circuit's standard, as none involve discharge or discipline. Indeed, under the Sixth Circuit's "discharge or discipline" standard, claims against a labor organization are a dead letter, as a labor organization can

neither discipline nor discharge a member. This is particularly problematic where a single standard is applied to claims against both labor organizations and employers. *See* Pet. App. 8a, 20a. This Court should, as it did in *White*, grant certiorari to bring the Sixth Circuit into conformity with the proper interpretation of adverse action under Title VII's religious accommodation provisions.

3. This Court should grant certiorari to resolve the split among the circuits and clarify the scope of adverse action in the religious accommodation context.

In the Sixth Circuit, an employee must prove that "he was discharged or disciplined for failing to comply with the conflicting employment requirement." Pet. App. 6a. As the dissent below noted, at least five other circuits employ a different, less restrictive standard under which "an adverse employment action short of discharge or discipline is sufficient to establish the prima facie case for religious accommodation." App. 17a. The Sixth Circuit's express requirement that an employee be discharged or disciplined as a condition of asserting a religious accommodation claim exacerbates a three way circuit split. At one extreme are the highly restrictive tests employed by the Fifth, Tenth, and Eleventh Circuits which require discharge in order to establish a prima facie case. Only marginally less restrictive are the Third, Fourth, and Sixth Circuits, which require discharge or discipline. A third group—the First, Second, Seventh, Eighth and Ninth Circuits—employ varying standards which are more consistent with this Court's analysis in *White*.

The discharge only circuits: Religious accommodation cases from the Tenth and Eleventh Circuits

make clear that under their extreme interpretation of Title VII, the adverse action element of a prima facie case is satisfied only by discharge. *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (defined as "he or she was fired for failure to comply with the conflicting employment requirement"); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007) (defined as "he was discharged for failing to comply with the conflicting employment requirement").

The Fifth Circuit appears to have recently migrated from the "discharge or discipline" group into this most restrictive group. The Fifth Circuit once used the term "disciplined" to describe the adverse action element. *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984). However, recent case law replaces the term "disciplined" with "discharged" in defining adverse action. *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000).

Under the discharge standard employed by these three circuits, the examples of adverse action offered by this Court in *White* would never constitute adverse action under the identical statutory language applicable to religious accommodation.

The discharge or discipline circuits: In addition to the Sixth Circuit, the Third and Fourth Circuits are slightly less restrictive, requiring only discipline rather than limiting adverse action solely to discharge. *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220, 224 (3rd Cir. 2000) (defined as "she was disciplined for failing to comply with the conflicting requirement"). The Fourth Circuit apparently once permitted action short of discipline to satisfy the adverse action element. Pet. App. 17a (citing *Ali v.*

Alamo Rent-A-Car, Inc., 8 Fed. Appx. 156, 158-59 (4th Cir. 2001)). This circuit has now drifted into the discharge or discipline camp. *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 311-12 (4th Cir. 2008) (element defined as "he or she was disciplined for failure to comply with the conflicting employment requirement").

Even under the less restrictive discharge or discipline standard employed by these three circuits, the examples of adverse action offered by this Court in *White* would never constitute adverse action under the identical statutory language applicable to religious accommodation.

The "White" circuits:[2] The First, Second, Seventh, Eighth and Ninth Circuits allow the adverse action element to be satisfied by something less than discharge or discipline. These circuits apply standards for adverse action that are more akin to *White*, although they vary in formulation and scope, ranging from among other things, a "material" change in title or duties in the Second Circuit, to mere "tangible" changes in the Eighth Circuit, to any change "of consequence" to an employee in the First and Seventh, to the "mere threat" of such a change in the Ninth Circuit.

Of these circuits, the Second and Eighth are among the more restrictive. *In Bowles v. New York City Transit Auth.*, 285 Fed. Appx. 812 (2nd Cir. 2008) (*per curiam*), the Second Circuit defined the adverse action element as "a 'materially adverse change in the terms and conditions of employment' . . . [and]

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[2] These circuits have employed varying definitions of adverse action that are generally consistent with *White*, although they have done so without explicit reference to *White*.

may include 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.'" *Id.* at 814 (quoting *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2nd Cir. 2006), *cert. denied*, 549 U.S. 1342 (2007)).

The approach of the Eighth Circuit is formulated differently than that of the Second Circuit, requiring only "a 'tangible change in duties or working conditions that constitute [sic] a material employment disadvantage.'" *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002). Under this standard, "[m]ere inconvenience without any decrease in title, salary, or benefits is insufficient to show an adverse employment action." *Id.* at 984.

Under the "material" and "tangible" change standards employed by these two circuits, treatment of the examples of adverse action in *White* is unclear. The change in schedule given as an example in *White* likely would constitute an adverse action if viewed in proper context, although the lunch invitation referred to in *White* very well might not constitute adverse action, even when viewed in context.

The approach of the First and Seventh Circuits is significantly broader. The First Circuit states the third element of a prima facie case merely as "adverse employment action" without further definition. *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002). Cases following this definition have interpreted it as applying to "something of consequence" to the employee. *See, e.g., Brown v. F.L. Roberts & Co.*, 419 F. Supp.2d 7, 13-14

(D. Mass. 2006) (lateral transfer without loss of benefits constituted adverse action).

The Seventh Circuit, in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997), stated the standard as "discharge or other discriminatory treatment." Under this standard, an employee who was neither discharged nor disciplined satisfied a prima facie case where his employer refused to allow him to take position with "public contact" because of a religiously motivated refusal to shave his beard. *EEOC v. United Parcel Service, Inc.*, 94 F.3d 314, 315 (7th Cir. 1996).

Under the standards employed by these two circuits, the examples of adverse action in *White* would constitute adverse action.

The Ninth Circuit states the standard even more broadly, finding the adverse action element to be established by a mere threat of such action. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) ("the employer, at least implicitly, threatened some adverse action"); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) ("discharged, threatened, or otherwise subjected . . . to an adverse employment action"). Under this standard, the examples of adverse action in *White*—indeed, the mere threat of such actions—would constitute adverse action.

The circuits are in total disarray as to what constitutes adverse action to satisfy the third element of a prima facie case. This uncertainty in the law results in disparate treatment of *amici*'s members and other persons of faith throughout the country based upon nothing more than their geographic location. Further, this same uncertainty makes it very difficult for

national organizations (including *amici*, labor organizations and employers) to adopt a principled and consistent approach to handling requests for religious accommodation. This Court should grant certiorari to dispel this confusion in the law.

4. This Court should grant certiorari to promote the vital public policy of preserving peace in the labor force.

Certiorari to clarify the requirements of Title VII would promote long-established public policy. The confusion among the circuits undermines the well-established policy of promoting peace among the labor force. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990) (noting "vital national interests in industrial peace" and "substantial public interests as well"). The confusion created by the circuit split creates uncertainty and fosters resentment among religious employees who learn of workers elsewhere who received more favorable treatment. Such disparities in treatment poison the workplace by engendering hostility and undermine the integrity of the judicial process. Moreover, the more restrictive interpretation which requires a religious employee to resort to the self-help remedy of refusing to comply with an employer's directive in order to vindicate her right to religious accommodation unnecessarily promotes labor conflicts, since the employee otherwise could comply with the employer's demand, then seek resolution through the EEOC, and ultimately challenge the demand in court.

This policy of promoting labor peace has been implemented by careful regulation of attempts at self-help. *See Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants*, 489 U.S. 426 (1989). The policy against self-help is particularly strong

where individual (rather than collective) self-help is concerned, and demonstrates a clear choice for the common sense proposition that where possible, workers should obey the directives of their employers and challenge them through established procedures later. *Fabricut, Inc. v. Tulsa Gen. Drivers*, 597 F.2d 227, 229-30 (10th Cir. 1979) ("It would not be workable if an insubordinate employee could resort to 'self help' . . . with impunity."). This policy remains unchanged by Title VII. *Argyropoulos v. City of Alton*, 539 F.3d 724, 733 (7th Cir. 2008) (Title VII "does not grant the aggrieved employee a license to engage in dubious self-help tactics").

A condition such as the Sixth Circuit's discharge or discipline requirement removes a religious employee's ability to seek meaningful assistance from the EEOC or challenge an employer's workplace directive after following the disputed directive. In so doing, the circuits requiring discharge or discipline have created an incentive for the generally disfavored remedy of self-help by an individual employee.

Under the restrictive test employed by some circuits, an employee ordered to work on a holy day, or to cut his religiously-required beard or hair, is faced with a Hobson's choice. If the employee complies with the employer's directive under protest, that employee has no avenue to seek vindication of his rights under Title VII, even in cases where it is undisputed that the employer could have provided a reasonable accommodation and acted in violation of Title VII. Likewise, an employee who is improperly ordered to cease religious expression must either engage in unreviewable self-censorship or else be subjected to discharge or discipline in order to obtain review of the directive, even where that order is a clear statutory violation.

As a result, the only method by which a religious employee may preserve her right to religious accommodation is to engage in self-help by refusing to obey the employer's directive and suffering the consequences of discharge or discipline.

By creating such a dilemma for employees, the restrictive circuits ensure that broad categories of claims by the most vulnerable religious workers who are most in need of Title VII's protections become wholly unreviewable. Conversely, this restrictive standard encourages otherwise unnecessary workplace disruptions since it ensures that the only way for a claim for religious accommodation to be successfully asserted is after discipline or discharge has been applied—thereby creating an artificial incentive for employees who wish to preserve their rights under Title VII to seek such discipline. This perverse incentive turns established policy on its head. This Court should grant certiorari to preserve the tranquility of the labor force and permit orderly adjudication of such disputes without unnecessary disruption of the workforce.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari in order to eliminate the conflict among the circuits over what an employee of faith must prove to claim a religious accommodation, and to provide guidance to the lower courts, employers and persons of faith as to what forced choices are proscribed by Title VII.

Respectfully submitted,

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